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HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 134/2006

Nirmal Singh

Versus

State of Chhattisgarh

Judgment for consideration

Sd/-
JUDGE
-4-2007

Hon'ble Mr. Justice Dhirendra Mishra

Sd/-
Dhirendra Mishra
Judge

Post it for pronouncement of judgment on 2-4-2007

Sd/-
L.C. Bhadoo
Judge

(31)

HIGH COURT OF CHHATTISGARH AT BILASPUR
CRIMINAL APPEAL NO. 134/2006

APPELLANT Nirmal Singh, son of Karam Singh aged about 30 years, R/o. Raikera, P.S. Gharghoda, at present R/o. Kodkel, Runiyakhar, Lailunga, Distt. Raigarh (C.G.)

Versus

RESPONDENT State of Chhattisgarh, through P.S. Gharghoda, Distt. Raigarh (C.G.)

D.B. : Hon'ble Shri L.C. Bhadoo and Hon'ble Shri Dhirendra Mishra, JJ.

Ku. Nirupma Bajpai, Advocate for the appellant.

Shri U.N.S. Deo, Additional Public Prosecutor for the respondent/State.

JUDGMENT

Per L.C.Bhadoo, J. :

This appeal is directed against the judgment of conviction and order of sentence dated 17-1-2000 passed by 3rd Additional Sessions Judge (F.T.C.), Raigarh in S.T. No. 153/2000, whereby the learned Addl. Sessions Judge after holding accused/appellant guilty for commission of offence under Section 302 of the Indian Penal Code, sentenced him to undergo imprisonment for life.

Case of the prosecution, in brief, is that husband of Dhankunwar (P.W. 5) had expired, therefore, accused-appellant Nirmal Singh brought her at his residence and kept her as his wife. Out of the wedlock, she gave birth to one male child Bablu and one female child. On the date of the offence i.e. 4-6-2000 they were aged about 4 years and five months respectively. The accused-appellant after quarrel with his wife left the house. Eight days before the date of incident i.e. 4-6-2000, he returned and started living with his wife and children. On 4-6-2000, the accused rushed towards his wife to attack her with axe, which was intervened by his maternal aunt Phulkunwar and in anger, he left the house along with briefcase, axe and bag along with his four years' son Bablu and five months' old daughter Babli. He went towards Gerupani and there, he attacked Babli with axe on her neck, as a result of which, she died spontaneously, thereafter the accused ran away after leaving behind his son Bablu and the items which he was carrying with him. He

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went to the house of Sarpanch Ghaniram and Karamsai. The matter was reported by P.W. 1 Bannuram in Police Station Lailunga on which P.W. 6 Assistant Sub Inspector registered the First Information Report Ex. P-13 and Merg Intimation Ex. P-14, left for the scene of occurrence and prepared inquest Ex. P-2 on the body of Babli. The Body of Babli was sent for post mortem examination to the Government Hospital, Lailunga where Dr. R.S. Upadhyay (P.W. 4) conducted post mortem on the body of Bablu and opined that cause of death was shock and haemorrhage as a result of cutting of wind pipe and food pipe. The death was homicidal in nature. He prepared post mortem report Ex. P-11. The investigating officer took into possession the blood stained soil and plain soil under Ex. P-7. One hand bag and clothes, which the accused left at the place of occurrence, were seized under Ex. P-6. While in police custody, the accused gave memorandum Ex. P-4 regarding axe, the weapon of offence, in pursuance of that, axe was recovered under Ex. P-5. After completion of investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate First Class, Gharghoda who in turn committed the case to the Sessions Judge from where learned 3rd Additional Sessions Judge received the case on transfer for trial.

Prosecution examined six witnesses at the trial. Statement of accused was recorded under Section 313 of Cr.P.C. in which he denied the material appearing against him in the prosecution evidence and stated that he is innocent, he has been falsely implicated in the crime.

Learned Additional Sessions Judge after hearing counsel for the respective parties, convicted and sentenced the accused as aforementioned.

We have heard Ku. Nirupma Bajpai on behalf of the appellant and Shri U.N.S. Deo on behalf of the State.

Ku. Bajpai has not disputed homicidal death of Babli. Moreover P.W. 4 Dr. R. S. Upadhyay who conducted post mortem on the body of Babli has stated that there was injury on the neck in size of 9cm x 3cm x 5cm, as a result of which the neck was separated however the same was attached with body with the help of skin. Food pipe and wind pipe were cut. These injuries were

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caused in front of neck with sharp and hard object and were grievous in nature. Cause of death was shock and haemorrhage on account of cutting of the food pipe and wind pipe, the injuries were sufficient in ordinary course of nature to cause death. The death was homicidal in nature. Therefore, in view of above medical evidence, it is established that the death was homicidal in nature.

As far as involvement of the accused in the crime in question is concerned, Ku. Nirupma Bajpai has argued that there is no eye-witness in the present case and in the F.I.R. it is not mentioned that the accused while leaving the house along with children was carrying axe, therefore the prosecution has failed to establish the crime against the accused.

On the other hand, Shri Deo supported the judgment of the trial Court.

In this case, there is no ocular or direct evidence against the accused. The case rests on circumstantial evidence and as per settled law, in order to convict an accused based on circumstantial evidence, the Apex Court in the matter of ***Dhananjoy Chatterjee Vs. State of West Bengal*** reported in ***(1994) 2 SCC 220*** held that :-

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the Court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

The prosecution has tried to establish the crime against the accused on the following circumstances:

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i. That, the accused just before the incident left the house along with his son Bablu, daughter Babli and also with an axe and just thereafter, the body of Babli was found in dead condition with injury on neck near Gerupani.

ii. Axe, the weapon of offence was recovered at the instance of the accused.

As far as these circumstances are concerned, P.W. 5 Dhankunwar, the mother of the child and wife of the accused has stated that on the fateful day, she returned to her house after doing her labour job. The accused demanded food, on which she replied from where she provides good food, therefore accused started quarreling with her, thereafter he left the house. He took both the children along with him. She tried to persuade him not to take the children but even then he took the children along with him. He was carrying axe with him. At about 10-11 am, his maternal father-in-law Banuram came, on which she informed him about taking away of the children by the accused. She requested him to go to see the children. He left and after some time, Banuram returned and informed her that the accused has murdered Babli, thereafter Banuram went to inform village Sarpanch and Kotwar, on which she along with Sarpanch and Kotwar went to the place of occurrence and saw the dead body of Babli. As the Bablu was weeping, therefore, one lady of Gurupani took Bablu at her residence.

In order to convict the accused based on last scene theory, as per settled law, there must be proximity between death and when the deceased was seen alive with the accused. The time gap between the two should be so small that there should not be any possibility of coming any third person in between. In the presence case, Dhankunwar (P.W. 5) has categorically stated that after becoming angry, the accused left the house along with deceased daughter Babli, son Bablu and one axe. When her maternal father-in-law Banuram came to her house, she informed and requested him to search the accused and children, thereafter Banuram left and returned after some time. He informed her that Babli has been murdered. Therefore she along with village Sarpanch and Kotwar went to the place of occurrence and saw dead body of her daughter Babli. Therefore, the time gap between when the accused left the

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house along with his daughter Babli and she was found dead with injury on neck was so small that there is no possibility of coming other person in between to commit murder of five months' daughter of the accused. Moreover, the manner in which the accused after getting angry with his wife left the house with deceased Babli aged five months and son Bablu aged 4 years. The conduct of the accused was such that the accused was the person who attacked Babli and committed her murder. Moreover the accused in his statement under Section 313 of Cr.P.C. has not explained the circumstances under which Babli sustained fatal injury because the accused is the person who snatched the daughter from his wife and took her away, therefore, it was within special knowledge of the accused how she sustained injury as Babli was in his custody, therefore, being within his special knowledge, as per Section 106 of Indian Evidence Act, the burden was on him to explain the circumstances under which Babli sustained injury.

Learned counsel for the appellant argued that in cross-examination of P.W. 1 Bannuram it has come that the accused disclosed to him that when he was going along with children, robbers came and committed murder, but this suggestion is without any basis. There is no explanation as to why the accused has not reported the matter to the police or villagers. The time was day light, moreover, he has not stated anything in his statement under Section 313 of Cr.P.C., therefore, the above argument of the learned counsel for the appellant that the murder was committed by some robbers is devoid of merit and is not based on any evidence on record.

P.W. 6 C.L. Pandey, the Assistant Sub Inspector-Investigating officer has stated that while in police custody, the accused gave memorandum Ex. P-4, in pursuance of that, an axe was recovered at the instance of the accused under Ex. P-5. A perusal of memorandum of accused Ex. P-4 shows that the accused gave memorandum regarding axe, the weapon of offence and the same was recovered at the instance of the accused under Ex. P-5. Dr. R. S. Upadhyay (P.W. 4) has stated that the axe in question was sent for his opinion and he gave opinion Ex. P-12. He opined that the injury found on the neck of the deceased Babli could be caused by

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the axe in question, therefore, recovery of the axe at the instance of the accused, the same was seen by P.W. 4 Dhankunwar, wife of the deceased when he was taking away the deceased, and the doctor has stated that the injury found on the neck of the deceased could be caused by the axe in question, therefore, for the foregoing reasons, based on above circumstances, the prosecution has been able to establish beyond reasonable doubt that the chain of the circumstances is complete and based on the above circumstantial evidence, only irresistible conclusion which can be drawn is that the accused was author of the crime in question and there is no possibility of any third person committing crime.

For the foregoing reasons, we do not find any merit in this appeal, the same is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C. Bhadoo
Judge

Sd/-
Dhirendra Mishra
Judge